Supreme Court of the United States

OCTOBER TERM, 1950

No. 486

PANHANDLE EASTERN PIPE LINE COMPANY
Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION AND
MICHIGAN CONSOLIDATED GAS COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR MICHIGAN PUBLIC SERVICE COMMISSION, APPELLEE

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I

Opinions Below.

The opinion of the Supreme Court of Michigan (R. 557) is officially reported at 328 Mich. 650 (adv. sheets). Unofficially it appears at 44 NW 2d 324. The opinion (R. 306) of the circuit court for the county of Ingham and the opinion and order (R. 21) of the Michigan Public Service Commission appear in the printed record.

II

Jurisdiction.

The judgment of the Supreme Court of Michigan was entered on the 27th day of October 1950 and appeal was granted by that court on or about the 6th day of December 1950 upon timely application therefor.

This Court on February 26, 1951, noted probable jurisdiction to review the judgment of the Supreme Court of Michigan pursuant to 28 U.S.C. § 1257 (2).

Exercising that privilege, we respectfully renew our objections to jurisdiction on grounds heretofore asserted in our statement and motion to dismiss. For judicial convenience, our statement opposing jurisdiction and motion to dismiss or affirm, is republished as Appendix "C", post, pp. 30-32.

III

Question Presented.

Appellant states, brief, p. 2, that "broadly, the question is whether a state has power, consistently with the Commerce Clause of the Constitution, to prohibit sales of natural gas in interstate commerce by an interstate pipe-line company direct to industrial consumers in the state." And, it is said, "This is the first case, we believe, where a state has ever asserted and sought to enforce such power, . . ."

Since Michigan has never asserted or sought to enforce an absolute or unqualified power to prohibit sales of natural

gas in interstate commerce, we regret our inability to accept counsel's definition of the issue, succinct though it be.[1]

Although perhaps too elaborate, the question presented might be stated as follows:

> Whether the State of Michigan, consistently with the Commerce Clause of the Constitution and the Natural Gas Act,[2] when regulating by statute[3] the rates charged and service performed by appellant interstate carrier in its sales of natural gas direct to industrial consumers through lateral pipes in which the high pressure of appellant's main pipe line has been substantially reduced,[4] within a municipality of the State already being served by a public utility supplying both domestic and industrial consumers, has power to require appellant, as a condition precedent to the rendering of such service, to obtain from the State's duly-constituted public service commission, a certificate of public convenience and necessity to per-

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[1]

It should be stated at once that Michigan does not seek to bar appellant from interstate commerce, nor to curtail or control the flow of natural gas through Panhandle Eastern's high-pressure lines, nor to exclude such commerce in order to limit competition or directly to serve local economic interests. What she does seek is to regulate natural gas rates and service on the local level and to protect this system of local regulation from the evil effects of an aggressive monopoly.

[2]

52 Stat. 821; 15 U.S.C. 717-717w.

[3]

Pub. Acts, Mich. 1929, No. 69, Mich. Stat. Ann. (Henderson, 1937, § 22.141 et seq.).

[4]

Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464.

form such service within the locality affected, to be granted or denied according to standards established by the state Act, it further appearing that in proceedings before the Federal Power Commission, appellant claims that the Commission "has no jurisdiction under the Natural Gas Act regarding the sale of gas to a direct industrial consumer" (R. 302) and that the Federal Power Commission has consistently disclaimed such jurisdiction (R. 302).

IV

Statute Involved.

The Michigan statute, the validity of which here drawn in question is to be tested by the Natural Gas Act, is entitled

> "AN ACT to define and regulate certain public utilities and to require them to secure a certificate of convenience and necessity in certain cases."

The full text of the Act, Mich. Stat. Ann., Henderson, 1937, § 21.141 et seq., is published as Appendix "A", post, pp. 26-28.

V

Counter-Statement.

We accept appellant's statement as augmented by the "Statement of Facts" set forth in the brief of Michigan Consolidated Gas Co., Appellee, except that we add thereto the following:

Contemporaneous proceedings before Michigan Public Service Commission and Federal Power Commission.

Appellant's contract with Ford (Ex. "A", R. 10-16) dated August 20, 1945, was executed September 28, 1945 (R.10, 16).

In the following November and December, complaints from interested parties were presented to the Commissions, State and Federal, regarding consequences which would flow from Panhandle Eastern's plan to sell natural gas direct to Ford and other industries, and a threatened reduction in the volume of gas furnished by Panhandle to Michigan Consolidated Gas Company and other local distributors (Ex. B, R. 17, Ex. 7, R. 410, and R. 406, 410.) Included in those addressed to the Federal Power Commission, hereinafter designated FPC, were complaints of Consolidated (R. 295, 410) and the Michigan Public Service Commission (R. 295, 409) as well as several complaints from public service commissions of Illinois and Indiana and from Indiana distributors (R. 296).

We reserve the right to discuss such proceedings in detail when presenting our argument, but for present purposes the following should be noted:

On the 12th day of December, 1945, in a letter addressed to FPC (Ex. 5, R. 407), regarding the Ford contract, Panhandle Eastern stated (R. 409-410):

> ". . . We are advised by our attorneys that it is not necessary for Panhandle to file any application with the (Federal Power) Commission under the provisions of the Natural Gas Act in connection with the sale of gas to the Ford Motor Company under this contract, since the construction and operation of Panhandle's existing

facilities are authorized by certificates of convenience and necessity heretofore issued by the Commission and the proposed metering and regulator station to be constructed are facilities incident to a direct sale of gas, subject matter excluded from the application of the provisions of the Natural Gas Act by Section 1 (b) thereof."[5]

One month later, in proceedings pending before the Michigan Public Service Commission, hereinafter for brevity designated MPSC, counsel for Panhandle Eastern filed a "Motion to Dismiss" (Ex. D, R. 19-20), assigning *inter alia* as a reason therefor that

> "the Michigan Public Service Commission has no jurisdiction over the subject matter of the sale of natural gas, a commodity in interstate commerce, by Panhandle Eastern . . . to Ford Motor Company."

Panhandle Eastern also claimed (R. 20) that MPSC was "without jurisdiction in regard to rates charged for gas sold and delivered as a commodity in interstate commerce" and that "any regulation of sale and delivery of natural gas in interstate commerce is for Congress; that insofar as the Federal Natural Gas Act is applicable to the contract in question, the matter is now pending before the Federal Power Commission, and the Michigan Public Service Commission should not presume to act upon any matter over which the Federal Power Commission may have jurisdiction." (R. 20).

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[5] The latter statement is, of course, well-supported by authority: Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507, and cases there cited, with which compare Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464.

In an order dated December 18, 1945 (Ex. 8, R. 411-415), the FPC required Panhandle Eastern to show cause, and the Commission instituted an investigation, consolidated the several proceedings pending before it,[6] and fixed a date for hearing.

Thereupon Panhandle Eastern filed with FPC its application (Ex. 9, R. 415-419) for a certificate of convenience and necessity to serve Ford Motor Company, praying in the alternative (R. 419), however, "that the Commission disclaim jurisdiction over the subject matter of the application herein for the reason that the same is excluded from the requirements of the provisions of the Natural Gas Act by Section 1 (b) thereof . . ."

On the 19th day of February, 1946, the MSPC, after conducting a full hearing, handed down an opinion (Ex. E, R. 21-33) and entered the desist and refrain order (R. 32) here in question, from which Panhandle Eastern on the 15th day of March, 1946, appealed to the circuit court for the County of Ingham in chancery by filing its statutory bill of complaint (R. 1-9).

Meanwhile, on the 14th day of March, 1946, FPC rendered its opinion (R. 295-303) and order (R. 304-305) dismissing without prejudice the application of Panhandle Eastern. In its opinion FPC held, among other things, that where, as here,

> "a company has not the capacity to sell a large quantity of gas to a new customer without impairing its ability to render satisfactory service to existing customers, it

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[6] The matters so consolidated, included a joint complaint of the City of Detroit and the County of Wayne, Michigan, as well as the controversy engendered by the contract with Ford (R. 411-415).

"is the duty of the Commission in protecting the interest of the public to prevent such company from using the facilities subject to its jurisdiction for such purpose. The Commission fixed the capacity of Panhandle's pipe line system for the furnishing of service to customers then represented by Panhandle to require gas service."

The FPC therefore concluded and found "that for Panhandle to use its presently authorized capacity for the purpose here under consideration would be contrary to its representations when it sought authorization for new capacity, violative of existing orders of the Commission, and against the public interest."

FPC was careful, however, "to make it plain that its action in this matter is not to be construed as an attempt to assert jurisdiction over a direct sale of gas as such."[7]

VI

Summary of the Argument.

The Michigan Public Service Commission, on the 19th day of February, 1946, filed a written opinion (Ex. E, R. 21-33) asserting its jurisdiction over the subject matter and thereupon issued the following order:

"That the Panhandle Eastern Pipe Line Company . . . cease and desist from making direct sales and deliveries

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[7]

As this Court has noted, Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, at 615, note 27, and as appellant now concedes, FPC "has expressed doubts over its power to fix rates on 'direct sales to industries' from interstate pipe lines as distinguished from 'sales for resale to the industrial customers of distributing companies'." See Annual Report, FPC, 1940, p. 11.

> of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such service."[8]

Such a certificate of public convenience and necessity is required by the provisions of § 2 of the Act here challenged on constitutional grounds. Insofar as pertinent, that section of the Act provides:[9]

> "No public utility shall hereafter . . . render any service for the purpose of transacting or carrying on a local business . . . in any municipality of this State where any other utility or agency is then engaged in such local business and rendering the same sort of service . . . until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such . . . operation."

Section 5 of the Act provides that in determining the question of public convenience and necessity

> "the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other

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[8] The order, under its express terms, was not to apply to direct sales to the Michigan Seamless Tube Company, at South Lyons, Michigan, for the reason that such service was approved by an order of MPSC on the 12th day of July, 1943 (R. 32-33) or to certain other companies otherwise serviced through the facilities of Panhandle Eastern.

[9] We have published as Appendix "A", post, pp. 26-28, the entire text of the Act, Mich. Stat. Ann., Henderson 1937, § 22.141 et seq.

matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. . . ."

Present challenge to the Act and the order issued thereunder is on the ground that as construed and applied by the Michigan Supreme Court the Michigan statute "prohibits interstate commerce in natural gas and violates the Commerce Clause;" that it gives the State Commission power to exclude interstate commerce in natural gas, in order to limit competition or to serve local economic interests; that the local authority in this case would seriously disrupt the interstate flow of gas, any local interest being outweighed by the national interest in the free flow of gas in interstate commerce; and that the state action is also a trespass on the authority of the Federal Power Commission over interstate transportation of natural gas by Act of Congress.

The Supreme Court of Michigan, accepting and relying upon the authority of this Court's decision in the "Indiana Case", *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, sustained the validity of the Michigan Act as against the objections urged.

We respectfully submit that the Michigan Court did not err in so holding, our argument running something like this:

First: The Congress, when enacting the Natural Gas Act, created "a comprehensive and effective regularity scheme, complementary in its operation to those of the States," the primary aim being "to protect consumers against exploitation at the hands of natural gas companies," and contemplating cooperative action between federal and state agencies, 332 U.S. at 520, citing *Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, at 610.

1. The Natural Gas Act excludes from federal regulation direct sales of gas for consumptive use, and the Federal Power Commission disclaims jurisdiction over such sales even though in interstate commerce.

2. Unlike *Automobile Workers* v. *O'Brien*, 339 U.S. 454, the Michigan Act does not conflict with a paramount, overriding National Policy expressed in a congressional enactment of broad scope, such as the Labor Management Relations Act, 1947, and the State is not required, as in that case, to step aside and abandon its regulatory scheme on the local level.

Second: The Michigan Act and the order of the Public Service Commission evinces no primary legislative intent to prohibit appellant's interstate commerce transactions; they are on the other hand valid regulatory measures bearing directly upon the establishment of reasonable rates for natural gas in local communities, and protecting the "marginal" local domestic consumer from exploitation.

VII

The Argument.

Point One

The Congress, when enacting the Natural Gas Act, created "a comprehensive and effective regulatory scheme, complementary in its operation to those of the States", the primary aim being "to protect consumers against exploitation at the hands of natural gas companies," and contemplating cooperative action between federal and state agencies.[10]

At least since 1912, when this Court passed upon the *Minnesota Rate Cases*, 230 U.S. 352, the principle has been recognized that in dealing with interstate commerce "it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."

> *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23, at 29.

Prior to enactment of the Natural Gas Act of June 21, 1938, before Congress entered the field, the Court "had delineated broadly between the area of permissible state control and that in which the states could not intrude," 332 U.S. at 514.

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[10]

Panhandle Eastern Pipe Line Co. v. Commission, 332 U.S. at 520, citing Power Commission v. Hope Gas Co., 320 U.S. 591, 609-610.

As clearly stated by Mr. Justice Rutledge in the Indiana Case, *supra*, 332 U.S. at 514-515:

> "Shortly then, as the decision stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipe-line carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate whenever the interstate carrier engaged in distribution for all of these uses. . . . On the other hand, sales for resale, usually to local distributing companies, were beyond the reach of state power, regardless of the character of the ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority."

And the Court, through Mr. Justice Rutledge, noted that it was this unsatisfactory condition of affairs that led to the demand for federal regulation and "Congress' response in the Natural Gas Act."

In other words, as the legislative history, provisions and policy of the Natural Gas Act will disclose, the statute was enacted at the behest and for the benefit of the States, to aid their local regulatory commissions in the performance of their duties, and to leave no unregulated area open to unrestrained monopoly.

Again, as the Court observed in the *Indiana Case, supra*, 332 U.S. at 519:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth

of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has 'occupied the field,' *i.e.*, the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control."

1. The Natural Gas Act excludes from federal regulation, direct sales of gas for consumptive use, and the Federal Power Commission disclaims jurisdiction over such sales even though in interstate commerce.

It seems scarcely necessary at this late date, in view of the decisions of this Court in Indiana and East Ohio,[11] to labor this point.

In *Indiana, supra,* the Court held (headnote 3) that "in the light of the legislative history, provisions, and policy of the Natural Gas Act, and of the judicial history leading to its enactment, sales of natural gas by an interstate pipeline carried direct to industrial consumers, although in interstate commerce, are subject to regulation by the states."

In *East Ohio, supra;* 338 U.S. 464, the Court adhered to that principle, 338 U.S. at 472, although at the same time sustaining the jurisdiction of FPC over the interstate transportation of natural gas through the high-pressure lines of East Ohio Gas Company.

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[11] Panhandle Pipe Line Co. v. Commission, 332 U.S. 507; Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464.

When answering an inquiry (Ex. 4, R. 406) from FPC regarding their contract with Ford, Panhandle Eastern stated (Ex. 5, R. 407, 408-409) they were advised by their attorneys that "the proposed metering and regulator station to be constructed (were) subject matter excluded from the application of the provisions of the Natural Gas Act by Section 1 (b) thereof."

And in its opinion (R. 295) FPC said, among other things,

> "The Commission wishes to make it plain that its action in this matter is not to be construed as an attempt to assert jurisdiction over a direct sale of gas such as this. However we do by our action in this matter indicate clearly that, in our opinion, the Natural Gas Act does confer on the Commission jurisdiction over a company found to be a natural gas company within the meaning of the Natural Gas Act, and over the facilities used by such company in either transporting natural gas in interstate commerce or in the sale of such gas for resale, especially to the extent necessary to enable the Commission to protect adequacy of service to its customers."[12]

As officially reported, 5 F.P.C. 43, the Commission also held (headnote 5) that where a company has not the capacity to sell a large quantity of gas to a new customer without impairing its ability to render satisfactory service to existing customers, it is the duty of the Commission in protecting the interest of the public to prevent such company from using facilities subject to its jurisdiction for such purpose; and the Commission found (headnote 6) that proposed use

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[12] This, as we view it, is the extent of the Commission's power over high pressure gas pipe lines in interstate commerce, as later defined by this Court in East Ohio, 338 U.S. 464.

of Panhandle's authorized capacity to serve Ford would be contrary to prior representations when it sought authorization for new capacity, violative of existing orders of the Commission, and against the public interest.

Speaking for the Court in *The Hope Gas Case, supra,* Mr. Justice Douglas said, among other things, 320 U.S. at 615-616:

> "But it is said that the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial uses should be discouraged. It should be noted in the first place that the rates which the Commission has fixed are Hope's interstate wholesale rates to distributors, not interstate rates to industrial users and domestic consumers. We hardly can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers . . . are subject to the rate-making powers of the Commission."

And in footnote 27, 320 U.S. at 615, it is said:

> "The Commission has expressed doubts over its power to fix rates on 'direct sales to industries' from interstate pipelines as distinguished from 'sales for resale to the industrial customers of distributing companies.' Annual Report, Federal Power Commission (1940), p. 11."

2. Unlike Automobile Workers v. O'Brien, 339 U.S. 454, the Michigan Act does not conflict with a paramount, overriding national policy expressed in a congressional enactment of broad scope, such as the Labor

Management Relations Act, 1947, and the State is not required, as in that case, to step aside and abandon its regularity scheme on the local level.

In the case of *O'Brien, supra*, 339 U.S. 454, and again in *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. ——, 95 L. ed. 383, this Court through the Chief Justice observed that by the National Labor Relations Act Congress has regulated labor relations to the full extent of its constitutional power under the Commerce Clause; that the Act encompasses all industries affecting interstate commerce; that congressional imposition of restrictions on strikes which might create national emergencies shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting interstate commerce; and that (95 L. ed. at 392)

> "The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Article 6 of the Constitution. Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand."

There is, on the other hand, and by way of rather sharp contrast, no conflict of law in the case at bar, nor is there any conflict of authority between the Federal and State Commissions presently involved. Nor is there any National Policy which overrides that of the Michigan legislature. No federal Commission has appeared in this cause to uphold the National Policy expressed in the Natural Gas Act; in fact the Federal Act was designed to aid and assist the States in enforcing their local regulatory measures.

The precise issue:

Counsel for Panhandle Eastern concede at the outset that they "are bound to acknowledge the authority of the states to regulate *rates* in sales of natural gas in interstate commerce when made by an interstate pipe-line carrier directly to industrial consumers," appellant's brief, p. 8.

> "Specifically (it is said), the Michigan Commission has power to regulate the rate on sale of natural gas by Panhandle to the Ford Motor Company for its own consumption."

But, it is urged the Michigan statute goes much further than this when it "*prohibits* interstate commerce in natural gas."

Michigan, of course, meets such a contention head-on by noting the fault in the premises to Panhandle Eastern's argument, and by pointing out that she does not seek, through enforcement of her statute, to bar appellant from interstate commerce. The Act in question regulates rather than prohibits, and such regulation is strictly on the local level of state and municipality.

Which brings us to the vital point in this controversy.

Point Two

The Michigan Act and the order of the Public Service Commission evinces no primary legislative intent to prohibit appellant's interstate commerce transactions; they are on the other hand valid regulatory measures bearing directly upon the establishment of reasonable rates for natural gas in local communities, and protecting the "marginal" local domestic consumer from exploitation.

As noted by us in defining the "Question Presented", *ante*, p. 2, Michigan has never asserted or sought to enforce an absolute or unqualified power to prohibit sales of natural gas in interstate commerce.

1. Michigan's regulation of natural-gas rates and service is strictly on a local level, not merely on a state-wide basis but with due regard for the rights of consumers in local municipal units or districts.[13]

What the law as enforced by the Michigan authority (MPSC) amounts to is simply this: where a local community is already served by some other public utility or agency selling gas to the ultimate consumer (whether domestic, commercial or industrial), a public utility, such as Panhandle, desiring to render such service "either directly or in-

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[13]

Long before creation of a state-wide authority to regulate public utilities, such matters were on a municipal franchise basis, and in a long line of decisions the Michigan Supreme Court adjusted the balance between such franchises and the public service commissions. See, e.g., City of Niles v. Mich. Gas & Elec. Co. 278 Mich. 255; City of Detroit v. MPUC 288 Mich. 267; City of Dearborn v. Mich. Consolidated Gas Co. 297 Mich. 588; City of Jackson v. Consumers Power Co., 312 Mich. 437; Mich. PSC v. Cheboygan, 324 Mich. 309; Mt. Pleasant v. Gas Co., 325 Mich. 501, 577.

directly", must first obtain from the Public Service Commission "a certificate that public convenience and necessity requires or will require such . . . service." Mich. Pub. Acts 1929, No. 69, § 2. In determining the question of public convenience and necessity, the Commission takes into consideration several reasonable factors, (1) the service being rendered by the utility then serving such territory, (2) the investment in such utility, the benefit, if any, to the public in the matter of rates, and (3) such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory." Certainly, then, the Act reveals no legislative intent to bar the flow of natural gas from interstate commerce.

The particular territory, district and municipality within the state of Michigan, affected by the statute, the order of the MPSC, and this litigation, is the Detroit metropolitan area wherein all manner of natural-gas service is urgently required, industrial to an enormous extent, commercial, and domestic. Any investigation conducted by the Michigan authority upon application of Panhandle for a certificate of public convenience and necessity, if and when made, would reveal the fact that literally thousands of domestic consumers within the metropolitan area are dependent upon natural-gas service to heat their homes, cook their meals, and otherwise supply their needs.

As noted in the margin of the Court's opinion in the *Indiana Case, supra*, 332 U.S. at 515, footnote 11, counsel for the National Association of Railroad and Utilities Commissioners, had the following suggestion to offer before the Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Session, 141, 143:

"Sales for industrial use ought not to be exempt from

all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established."

Indeed it might well be said that such a thought lies at the very base of Michigan's regulatory policy with respect to the sale and service of natural gas, *viz.*, "just and reasonable rates, for the several classes of service, properly related to each other."

For quite definitely there is a relationship between rates established, charged and earned in the sale of natural gas to industries within any municipality, and the reasonable rates to be charged domestic consumers. For the larger the revenue earned by the public utility in serving large industries, the more reasonable and lower the rate charged the "marginal" man who depends upon natural gas for his domestic consumption.

2. Before this controversy arose, Panhandle's interstate pipe-lines carried natural gas under high pressure to Michigan Consolidated, the distributor in the Detroit area. Up to the point of such distribution, where pressure was lowered, the State of Michigan was powerless to regulate. Congress under the Natural Gas Act fixed the rates for such wholesale transactions. And thereafter both rates and service were regulated by the Michigan authority charged with the duty.

But Panhandle Eastern plans to change all of this; it would sell its natural gas direct to any large industrial con-

sumers (the present customers of Consolidated) who might choose to buy. It would thus deprive Consolidated of its principal source of revenue with dire results to the latter's economy. And it would thus establish in Michigan a powerful monopoly.

3. Counsel argue, however, that Michigan is powerless to protect and safeguard the economic welfare of one of its local enterprises by absolutely prohibiting the sale of natural gas to industries in interstate commerce. And of course they would be right in urging the point if the premises to their argument were sound.[14]

Such, however, is not the object of the Michigan Act.

The design, purpose and intent of the Michigan statute is to protect and safeguard the State's system of rate regulation. For if Panhandle is permitted to enter a field already adequately served by a distributor to whom it now sells a supply of natural gas, deprive it of one of its chief sources of revenue, the Michigan authority may continue to regulate the rates charged to such industries by Panhandle, but the reduction in such revenue will have a direct and immediate effect upon the domestic householder who lives on a narrow margin of existence.

Putting it bluntly, the result would be the utter destruction of Michigan's natural-gas rate structure.

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[14]

Such was the point urged in Buck v. Kuyendall, 267 U.S. 307 upon which appellant relies. In that case, however, the Washington statute requiring certificates of convenience and necessity of common carriers of passengers and express purely in interstate commerce, was struck down by this Court because it constituted a prohibition of competition.

VIII

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court of Michigan should be affirmed.

Respectfully submitted,

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Appendixes.

"A" Copy of Michigan Act in question, No. 69, 1929, Mich. Stat. Ann. (Henderson 1937).

"B" Bibliography, Law Review articles.

"C" Copy of statement of Michigan Public Service Commission opposing jurisdiction.

Appendix "A".

Copy of Michigan Act in question, viz., No. 69, 1929, (Mich. Stat. Ann. Henderson 1937), § 22.141 et seq.

AN ACT to define and regulate certain public utilities and to require them to secure a certificate of convenience and necessity in certain cases.

The People of the State of Michigan enact:

Section 1. The term "municipality", when used in this act, means a city, village or township.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission. (Mich. Stat. Ann., Henderson, § 22.141)

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in

such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension. (Mich. Stat. Ann., Henderson, 1937, § 22.142)

Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business. (Mich. Stat. Ann., Henderson, 1937, § 22.143)

Sec. 4. Upon filing such application, the commission shall set a day for the hearing thereof in accordance with its rules and practice relating to hearings and notify the applicant thereof. A copy of said application and a notice of the time and place of hearing such application shall also be served upon each and every other utility or agency in the municipality or municipalities proposed to be served by said applicant then rendering similar service therein, and also upon the clerk or other similar officer of each municipality, at least ten [10] days before such hearing, and said persons so served shall each be permitted to appear and be heard with reference to said application. (Mich. Stat. Ann., Henderson, 1937, § 22.144)

Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any,

to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. Every certificate of public convenience and necessity issued by the commission, under the authority hereby granted, shall describe in detail the territory in which said applicant shall operate and it shall not operate in or serve any other territory under the authority of said certificate. (Mich. Stat. Ann., Henderson, 1937, § 22.145)

Sec. 6. Any person aggrieved by the order of the commission made upon said application may review such order in the manner now provided by act number four hundred nineteen [419] of the public acts of nineteen hundred nineteen [1919] for reviewing the orders of the Michigan public utilities commission. (Mich. Stat. Ann., Henderson, 1937, § 22.146)

Appendix "B"

Bibliography

Pertinent law review articles dealing with the subject matter here involved:

"Oil and Gas—State Regulatory Power under § 1 (B) of the Natural Gas Act," Vol 1, Baylor Law Review, p 90.

"Federal Natural Gas Act: Effect on Interrelation of State and Federal Regulation," Vol 27, Cornell Law Quarterly, p 399.

"Regulation of Natural Gas—Federal v. State," Vol 27, Dicta p 216.

"The East Ohio Gas Company Litigation," Vol 64, No 3, Harvard Law Review, January, 1951, p 464.

"Administrative Law—Natural Gas Production and Gathering," Vol 4, Miami Law Quarterly, p 233.

"The Federal Natural Gas Act and the Commerce Clause," Vol 14, Missouri Law Review, p 80.

"Interstate Commerce—The Natural Gas Act—Direct Sales to Ultimate Consumers," Vol 23, Notre Dame Lawyer, p 357.

"Trade Regulations—Oil and Gas—Federal Regulation of Intrastate Companies," Vol 25, Notre Dame Lawyer, p 583.

"Oil and Gas—Jurisdiction of the Federal Power Commission under § 1 (B) of the Natural Gas Act," Vol 26, Texas Law Review, p 226.

"Public Utilities—Natural Gas Act—Intrastate Company Receiving Natural Gas Piped From Other States and Selling Directly to Consumers Held Subject to Regulation under Natural Gas Act," Vol 36, Virginia Law Review, p 261.

"Federal Regulation of Natural Gas Companies—The East Ohio Gas Case," Vol 2, June 1950, Western Reserve Law Review, p 55.

"Jurisdictional Conflicts Under the Natural Gas Act," Vol 17, University of Chicago Law Review, p 479.

"Oil and Gas—Natural Gas Act—FPC Jurisdiction Extends to Natural Gas Moving Directly from Producing Wells to Consumers if the Flow Crosses a State Line," Vol 98, No 6, May 1950, University of Pennsylvania Law Review, p 934.

Appendix "C"

Copy of "Statement of Michigan Public Service Commission opposing jurisdiction and Motion to Dismiss or Affirm."

The Michigan Public Service Commission, one of the appellees, believing that the matters set forth below will demonstrate the lack of substance in the Federal questions raised by this appeal, file this, their statement, disclosing matters and grounds making against jurisdiction and pursuant to Supreme Court Rule 12, § 3, they respectfully move the Court to dismiss the appeal or affirm the judgment of the court below, on the following grounds:

First: Questions here presented involving the validity of the Michigan statute requiring public utilities there defined to secure a certificate of public convenience and necessity in certain cases[1] are not ripe for decision by this Court:

(a) the appellant has not exhausted the administrative or judicial remedies made available to it by such state law; it has not applied for, much less has it been denied upon consideration of all the facts and circumstances a certificate of public convenience and necessity, nor having been so denied has it sought the judicial review afforded by the statute;[2]

(b) the court below in their decision, 328 Mich. at 655, left the door open to appellant's pursuit of such remedies; and it becomes increasingly apparent in contemplation of the

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[1] Pub. Acts Mich. 1929, No. 69, Comp. Laws Mich. 1948, § 460.501 *et seq.*, Mich. Stat. Ann. (Henderson) § 22.141 *et seq.*

[2] *Idem.*, § 6, Comp. Laws Mich. § 460.506, Mich. Stat. Ann. § 22.146.

entire opinion, that the relief sought was denied without prejudice;[3]

(c) therefore it cannot be said with that degree of certainty essential to jurisdiction, that this Court is called upon by § 1257, Title 28 USC as revised, to review a final judgment or decree rendered by the highest court of Michigan on the questions now presented.[4]

Second: The Federal questions raised on behalf of appellant are so unsubstantial as to need no further argument, and therefore warrant the Court in summarily disposing of the appeal at this stage of the proceedings, *specif.*, because

(a) they have been set at rest in principle by recent decisions of this Court;[5]

(b) such decisions established the doctrine that the purpose of the Natural Gas Act[6] is to provide an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, complementary to such scheme of regulation adopted by any State;

(c) under such decisions § 1 (b) thereof made the Nat-

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[3] The decree of the court below affirmed, 328 Mich. at 665, the order (R. 47) of the commission that Panhandle desist and refrain from making direct sales of natural gas until such time as it has obtained the certificate required by Michigan law.

[4] *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, with which *cf. Cities Service Gas Co.* v. *Peerless Oil & Gas Co., et al.*, No. 153, October Term, 1950, Dec. 11, 1950; see also *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543.

[5] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, and cases cited; *cf. Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, and cases there cited.

[6] 52 Stat. 821, as amended by 56 Stat. 83, 15 U. S. C. § 717 *et seq.*

ural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation;[7]

(d) the applicable Michigan law (note 1) as construed by her highest court, 328 Mich. 650, as here applied, does not interfere with the jurisdiction or authority of the Federal Power Commission under the Natural Gas Act, nor does it regulate or attempt to regulate the transportation of natural gas in interstate commerce, or its sale in interstate commerce for resale; on the contrary the Michigan statute places a reasonable police regulation upon the appellant.

WHEREFORE, the Michigan Public Service Commission, appellee, respectfully submits this statement disclosing the foregoing matters and grounds making against the jurisdiction of this Court, and in that connection, its motion to dismiss or affirm.

Respectfully submitted,

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[7] *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464.